UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. S1-4:05 CR 605 HEA DDN |
| | ) | |
| VIRGIL LEE JACKSON and GLEN THOMAS DOTSON, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

**SECOND ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This action is again before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). A hearing was held on August 14, 2006. The parties were given until September 6, 2006, to file post-hearing memoranda.

In the original indictment, defendant Virgil Lee Jackson alone was charged with one count of possessing a firearm on October 24, 2005, after he had previously been convicted of three felony offenses. Thereafter, defendant filed pretrial dispositive and non-dispositive motions, an evidentiary hearing was held on March 7, 2006, and on April 12, 2006, the undersigned issued an Order and Recommendation regarding those motions. On April 26, 2006, the district judge adopted the recommendations.

On May 25, 2006, the grand jury returned a superseding indictment. In it defendant Jackson is charged with the original offense of being a felon in possession of a firearm on October 24, 2005 (Count 2). However, the superseding indictment further charges him with using a facility of interstate commerce (cellular telephones) between December 2004 and October 2005 with the intent that a murder be committed as consideration for the receipt of something of pecuniary value (Count 1).

In Count 3, the superseding indictment charges Glen Thomas Dotson alone with conspiracy to deliver a specifically described firearm to

defendant Jackson on October 22, 2005. Two overt acts are alleged to have occurred on October 22, 2005.

Following the filing of the superseding indictment, the parties engaged in renewed motion practice which the court took up on August 14.

**1. Refiled pretrial motions**

Defendant Jackson has moved for leave (Doc. 111) to refile the following motions which had been ruled by this court:

(a) defendant's motion to reveal identities of confidential informants (Doc. 28);

(b) defendant's motion for government to disclose intention to use Rule 404(b) evidence (Doc. 29);

(c) defendant's motion for production and inspection of grand jury transcripts, recordings, minutes, and reports (Doc. 32);

(d) defendant's motion for leave to take depositions (Doc. 34);

(e) defendant's motion to suppress statements (Doc. 35); and

(f) defendant's motion for leave to file additional and/or supplemental pretrial motions (Doc. 36).

Each of these motions was dealt with in the Order and Recommendation filed on April 12, 2006. At the hearing held on August 14, counsel for defendant Jackson indicated that no further presentation of evidence or argument would be made on the renewed motions. After due consideration, the undersigned will consider the subject motion as one for the reconsideration of the above-listed motions. Having duly reconsidered said motions, the undersigned sees no reason to change any prior ruling or recommendation. Therefore, the undersigned hereby adopts the earlier rulings and recommendations.

**2. Motion for bill of particulars**

Defendant Jackson has moved for a bill of particulars as to the superseding indictment (Doc. 110). In its response to this motion, the government has indicated that it has adopted an "open file" policy in this case. Thus, the government has made available to the defendants all of the information and evidence in its investigative file of the case. Therefore, and for the reasons set forth in the Order and

Recommendation filed on April 12, 2006, regarding defendant Jackson's earlier filed motion for a bill of particulars, his current motion will be denied.

**3. Motions to dismiss**

Defendant Jackson (Doc. 106) and defendant Dotson (Doc. 118) have each moved to dismiss the superseding indictment.

Defendant Jackson argues that Count 1 of the superseding indictment is legally insufficient on its face, because the facts upon which the charge is based are legally insufficient. He also argues that the indictment generally is vague and indefinite because it does not allege more specific facts to support the allegations, and because the statute upon which the count is based, 18 U.S.C. § 1958, is unconstitutional as applied to the facts of this case because the facts do not indicate that interstate commerce was substantially affected.

The motion should be denied. Count 1 is legally sufficient on its face. To be legally sufficient on its face, the indictment must contain all the essential elements of each offense charged; it must fairly inform each defendant of the charge against which he must defend; and it must allege sufficient information to allow a defendant to plead a conviction or an acquittal as a bar to a future prosecution. U.S. Const. amends. V and VI; Fed. R. Crim. P. 7(c)(1); Hamling v. United States, 418 U.S. 87, 117 (l974); United States v. White, 241 F.3d 1015, 1021 (8th Cir. 2001).

Count 1 alleges all the essential elements of a violation of § 1958, i.e., that defendant (1) used or caused to be used an interstate facility (cellular telephones), (2) with the intent that a murder be committed in violation of the laws of the United States or of the state of Missouri, and (3) with the murder to be consideration for the receipt of something of pecuniary value (additional bail bond business). See 18 U.S.C. § 1958; United States v. McGuire, 45 F.3d 1177, 1186 (8th Cir.), cert. denied sub nom. Mendacina v. United States, 515 U.S. 1132 (1995); see also United States v. Giordano, 442 F.3d 30, 39-40 (2nd Cir. 2006)(use of telephone system, even if for purely intrastate communication, proves element (1)).

Because the indictment is legally sufficient on its face, the court should not further investigate to determine whether it is supported by legally obtained and sufficient evidence. See United States v. Calandra, 414 U.S. 338, 349-52 (1974); Costello v. United States, 350 U.S. 359, 363-64 (1956); United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988).

Defendant has moved to dismiss Count 1, because the statute upon which it is based, 18 U.S.C. § 1958, is unconstitutional because it does not sufficiently affect interstate commerce. United States v. Lopez, 514 U.S. 547 (1995), and United States v. Morrison, 529 U.S. 598 (2000). The undersigned disagrees. As the Supreme Court in Morrison observed, under Lopez, the Supreme Court

> identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

529 U.S. at 608-09 (internal quotations and citations omitted). Section 1958(a) provides,

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay anything of pecuniary value, or who conspires to do so, shall be [punished].

18 U.S.C. § 1958(a). The statutory interstate language of § 1958, as reflected in the allegations of the indictment and the essential elements of the charged offenses, complies with the constitutional constraints of Lopez and Morrison.

Defendant argues that the alleged interstate facility, i.e., the use of cellular telephones, is legally insufficient, because such would

not sufficiently affect interstate commerce to be a constitutional application of § 1958. The undersigned disagrees. The aggregate of the relevant telephonic system, if as an entity it crosses state lines, can be a facility of interstate commerce. See Giordano, 442 F.3d at 40 n.7; United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999)(defendant used cell phone in Kentucky to place a call that required the use of transmission facility in Indiana); cf., United States v. Corum, 362 F.3d 489, 493 (8th Cir. 2004)("It is well-established that telephones, even when used intrastate, are instrumentalities of interstate commerce"), cert. denied, 543 U.S. 1056 (2005). Whether or not the use of the cellular telephone in the case at bar is constitutionally sufficient for conviction is a jury issue. United States v. Drury, 396 F.3d 1303, 1313 (11th Cir. 2005).

For these reasons, the motion of defendant Jackson to dismiss should be denied.

Defendant Dotson has moved to dismiss the superseding indictment because Count 3, the only count with which he is charged, is legally insufficient on its face and is not supported by sufficient evidence. The undersigned disagrees.

Count 3 alleges a violation of 18 U.S.C. §§ 371 and 922(d)(1), in that Dotson conspired with Jackson, a known felon, for Jackson unlawfully to possess a firearm, in that Dotson delivered the subject firearm to Jackson. Count 3 alleges all the essential elements of the § 371 conspiracy, i.e., that defendant (1) agreed with another (Jackson) (2) to achieve an unlawful objective (to violate 18 U.S.C. § 922(d)(1)),and (3) at least one overt act (in this case, two overt acts) was committed in furtherance of the agreement. United States v. Falcone, 311 U.S. 205, 210 (1940); United States v. Cerone, 830 F.2d 938, 944 (8th Cir. 1987).

Because Count 3 is legally sufficient on its face, defendant's argument that the count is not supported by legally sufficient evidence must await trial. Calandra, 414 U.S. at 349-52; Costello, 350 U.S. at 363-64.

For these reasons, both motions to dismiss should be denied.

**4. Motions to sever**

The superseding indictment charges defendant Jackson alone in Count 1 with a violation of 18 U.S.C. § 1958; it charges defendant Jackson alone in Count 2 with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); and it charges defendant Dotson alone in Count 3 with conspiracy to violate federal law by delivering the Count 2 firearm to defendant Jackson, in violation of 18 U.S.C. §§ 922(d)(1) and 371.

Defendant Jackson has moved to sever counts and defendants (Doc. 108), and defendant Dotson has moved to sever defendants (Doc. 119). In determining whether any defendant is entitled to a separate trial, the court must decide whether joinder (1) was proper under Federal Rule of Criminal Procedure 8, and (2) is likely to have a "substantial and injurious effect or influence in determining the jury's verdict." United States v. Lane, 474 U.S. 438, 449 (1986) (internal quotations omitted); United States v. Ruiz, 412 F.3d 871, 886 (8th Cir. 2005).

Federal Rule of Criminal Procedure 8 provides

> **(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
>
> **(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8.

Rule 8(a) requires that the face of the indictment indicate that the joined counts are factually interrelated. Ruiz, supra. The superseding indictment before the court alleges that Counts 1 and 2 occurred in October 2005 and that both counts were crimes involving violence. The underlying facts of the case, as indicated by the memorandum of the government filed in response to defendant Jackson's motion to suppress, and which are described in the Order and

Recommendation of the undersigned filed on April 12, 2006 (Doc. 63 at 4-5), indicate that the firearm alleged in Counts 2 and 3 of the superseding indictment relates to the Count 1 charge. In this context, the superseding indictment's allegations are sufficient to warrant the joinder of Counts 1 and 2 against defendant Jackson.

For the proper joinder of all three counts in the same indictment, "Rule 8(b) requires that there be some common activity involving all of the defendants which embraces all the charged offenses even though every defendant need not have participated in or be charged with each offense." United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir. 1982); accord United States v. Quiroz, 57 F. Supp. 2d 805, 828 (D. Minn. 1999). The propriety of the joinder generally must appear on the face of the indictment. United States v. Wadena, 152 F.3d 831, 848 (8th Cir. 1998); United States v. Andrade, 788 F.2d 521, 529 (8th Cir. 1986).

There is a presumption that all charged co-conspirators should be tried together when the proof against each is based upon the same facts and evidence. See United States v. Frazier, 280 F.3d 835, 844 (8th Cir. 2002); United States v. Huff, 959 F.2d 731, 736 (8th Cir. 1991).

In this case, Counts 2 and 3 are clearly factually interrelated, because they involve the same firearm and time period. Thus, Count 1 is thereby factually related to Count 3 and all three counts and both defendants were properly joined under Rule 8.

"Once defendants are properly joined under Rule 8, there is a strong presumption for their joint trial, as it gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." United States v. Flores, 362 F.3d 1030, 1039(8th Cir. 2004) (internal quotations omitted).

Proper joinder vel non is but one factor to assess in determining whether severance should be ordered because of undue prejudice under Rule 14. Joint trials are favored because they “conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.” Lane, 474 U.S. at 449 (internal quotations omitted). The court must look to defendant’s showing that prejudice would result from joinder and consider whether such prejudice can be avoided at trial. Very often, relevant factors

cannot be fully evaluated until during trial, such as the effect of limiting instructions, the nature and strength of the government's evidence, and the number of defendants tried jointly. United States v. Sazenski, 833 F.2d 741, 745-46 (8th Cir. 1987) .

Despite the preference for joint trials, if the joinder of offenses or defendants in an indictment appears to prejudice a defendant unduly, the court may order separate trials of counts, sever the defendants for separate trials, or provide any other relief that justice requires. See Fed. R. Crim. P. 14(a); United States v. Zafiro, 506 U.S. 534, 539 (1993); United States v. Boyd, 180 F.3d 967, 982 (8th Cir. 1999). "To grant a motion for severance, the necessary prejudice must be 'severe or compelling.'" United States v. Pherigo, 327 F.3d 690, 693 (8th Cir.), cert. denied, 540 U.S. 960 (2003).

Some factors may require pre-trial severance, e.g., when the government intends to offer a confession against one defendant which would incriminate a co-defendant. A defendant is entitled to a separate trial to avoid the prejudice of not being able to cross examine the declarant. Bruton v. United States, 391 U.S. 123, 136 (1968). Such prejudice can be avoided by the redaction from the confession of any reference to the co-defendant. United States v. Bolden, 92 F.3d 686, 687 (8th Cir. 1996). In this case, defendant Jackson argues, and the government has confirmed the possibility, that co-defendant Dotson has made statements to the government in proffers of information that have incriminated Jackson. However, government counsel stated at the August 14 hearing that the government would redact from any such statement any reference to the non-declarant, jointly tried, co-defendant.

Defendant Jackson argues that Count 2 should be severed for a trial separate from Count 1, because the Count 2 evidence of his prior convictions will unduly prejudice the jury against him on Count 1. Without more of an indication of prejudice than the nature of the jointly charged offenses, a felon in possession charge may be jointly tried with a factually related offense. See United States v. Rock, 282 F.3d 548, 552 (8th Cir. 2002). Here, nothing more than the nature of the jointly charged crimes has been shown to establish prejudice entitling either defendant to severance.

Both defendants argue that the jury would not be able to keep the evidence relating only to one charge separate from another charge or evidence relating to one defendant separate from the charge against the other. A defendant can demonstrate that the denial of a severance motion resulted in clear prejudice by showing the jury could not "compartmentalize" the evidence. In assessing the jury's ability to compartmentalize the evidence against jointly tried defendants or jointly tried counts, the court can consider the complexity of the case and the adequacy of the jury instructions and admonitions to the jury. United States v. Ghant, 339 F.3d 660, 665-66 (8th Cir. 2003). Such an analysis is made more appropriately during the trial, when undue prejudice might be indicated or diminished. It is during trial that the court can cure potential problems by a less drastic measure than severance, such as a limiting instruction. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

Both defendants argue generally that a joint trial would prevent the other from being available as a defense witness, because the other can invoke his right not to be compelled to testify. This argument is without merit because it is unsupported by a statement of what the other's testimony could be and by some reason to believe the other would in fact testify for the movant. Jackson also argues that the government could "flip" Dotson into being a government witness to secure more favorable treatment. Jackson's argument in favor of a separate trial would be somewhat moot, if the government succeeds in "flipping" Dotson, because he would perhaps not need a trial.

Finally, Jackson argues that his and Dotson's defenses are antagonistic and thus Jackson is entitled to a separate trial. A defendant can show real prejudice from failure to sever a joint trial by showing that his defense is irreconcilable with his co-defendant's defense. Defenses of joint defendants are deemed irreconcilable, and would warrant severance, when they so conflict that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other. United States v. Abfalter, 340 F.3d 646, 652 (8th Cir. 2003). However, "[t]he mere fact that one defendant tries to shift blame to another defendant does not mandate separate trials." Flores,

supra. "Similarly, the possibility that a defendant's chances for acquittal may be better in a separate trial is an insufficient justification for severance." Id. Moreover, conflicting or mutually antagonistic defenses are not be prejudicial per se. Zafiro, 506 U.S. at 539. In the case at bar, defendant Jackson has only speculated generally about inconsistent defenses and has not shown what those defenses are expected to be.

The motions for severance should be denied without prejudice.

**5. Motion to suppress evidence**

Defendant Dotson has moved to suppress statements and to suppress evidence (Doc. 105). At the hearing, counsel for the United States indicated that the only statements it might offer against defendant Dotson are those made during non-custodial proffers of information he made to the government with his counsel present. Further, counsel for the government has stated that nothing seized from the person of Dotson would be offered into evidence during the government's case in chief.

Upon this record, it clearly appears, and the undersigned concludes, that the motion to suppress is moot as to any physical evidence about the seizure of which defendant Dotson can complain, because no arguably suppressible physical evidence will be used against him at trial. Further, the motion to suppress appears to be moot regarding defendant Dotson's statements, because none of them appear to be arguably suppressible.

Whereupon,

**IT IS HEREBY ORDERED** that the motion of defendant Virgil Lee Jackson
(Doc. 111) for leave to refile motions, considered a motion to reconsider the earlier rulings and recommendations in light of the superseding indictment, is sustained. Having made such reconsideration, the undersigned hereby adopts the rulings and recommendations made on the subject motion, all as set forth in the Order and Recommendation filed April 12, 2006.

**IT IS FURTHER ORDERED** that the motions of defendant Jackson for an order granting additional peremptory challenges (Docs. 30 and 109) are deferred to the district judge for ruling at trial.

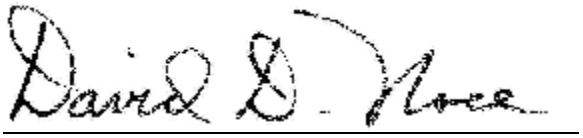
**IT IS FURTHER ORDERED** that the motion of defendant Jackson for a bill of particulars as to the superseding indictment (Doc. 110) is denied.

**IT IS HEREBY RECOMMENDED** that the motions of defendant Jackson (Doc. 106) and defendant Dotson (Doc. 118) to dismiss the superseding indictment be denied.

**IT IS FURTHER RECOMMENDED** that the motions of defendant Jackson to sever counts and defendants (Doc. 108), and defendant Dotson to sever defendants (Doc. 119) be denied without prejudice.

**IT IS FURTHER RECOMMENDED** that the motion of defendant Dotson to suppress statements and to suppress evidence (Doc. 105) be denied.

The parties are advised they have until September 25, 2006, to file written objections to this Order and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.



**DAVID D. NOCE**
**UNITED STATES MAGISTRATE JUDGE**

Signed on September 13, 2006.